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QSI, Inc. and United Food and Commercial Workers International Union, CLC¹

Smithfield Packing Company, Incorporated, Tar Heel Division and United Food and Commercial Workers International Union, CLC. Cases 11–CA–20240, 11–CA–20317, 11–CA–20241, and 11–CA–20281

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND WALSH

On April 11, 2005, Administrative Law Judge Lawrence W. Cullen issued the attached decision. Respondents QSI, Inc. (QSI) and Smithfield Packing Company, Incorporated, Tar Heel Division (Smithfield), each filed exceptions and a supporting brief, the Charging Party filed an answering brief, and Smithfield filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record² in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order as modified and set forth in full below.⁴

¹ We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

² On June 6, 2005, Respondent Smithfield filed an unopposed motion requesting that the Board accept an original surveillance-camera videotape and the video cassette recorder necessary to view it. The original videotape and a copy were introduced into evidence at the hearing, but Smithfield retained physical custody of the original. Smithfield argued in its motion, and in its brief in support of exceptions, that it was necessary for the Board to view the original videotape. On January 5, 2006, the Board granted Smithfield's motion and subsequently viewed the original videotape.

³ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ We have modified the judge's recommended Order in accordance with our decisions in *Excel Container*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001), and to conform to standard remedial language. We have substituted new notices that reflect these changes.

Respondent QSI provides nightly cleaning services at Respondent Smithfield's pork-processing facility located in Tar Heel, North Carolina. This case concerns the Respondents' reaction to a November 15, 2003⁵ walkout by QSI employees to protest, among other things, QSI's discharge that day of certain managers and supervisors, including Supervisor Antonio Cruz. The judge found that the employees' walkout was protected by Section 7 of the Act and that QSI and Smithfield each committed numerous violations of Section 8(a)(1) of the Act in response to the walkout.⁶ We agree with all of the judge's unfair labor practice findings, although we clarify certain parts of his rationale, as follows.

1. In concluding that the QSI employees' walkout was protected by Section 7 of the Act, the judge found that the walkout was "a reasonable means of protest under the Act." We recognize that, when employees engage in concerted protest of the selection or termination of a supervisor, certain Federal courts of appeal consider the reasonableness of the employees' means of protest in determining whether the employees' activity merits Section 7 protection.⁷ However, consistent with the Supreme Court's decision in *NLRB v. Washington Aluminum Co.*,⁸ "the Board has not imposed a 'reasonable means' requirement on employees' concerted activity." *Accel, Inc.*, 339 NLRB 1052, 1052 (2003); see also *Trompler, Inc.*, 335 NLRB 478, 480 fn. 26 (2001), *enfd.* 338 F.3d 747 (7th Cir. 2003). We reaffirm that position today.

Even were we to apply a "reasonableness" requirement to the circumstances here, we would affirm the judge's finding that the employees' November 15 walkout was reasonable. As indicated, a main impetus of the walkout was Respondent QSI's discharge of Supervisor Cruz. The record establishes that Respondent QSI had previously discharged Supervisor Cruz but, in response to employee objections, had agreed on November 10 to

⁵ All dates hereafter are 2003 unless otherwise indicated.

⁶ The judge found that Respondent QSI violated Sec. 8(a)(1) by discharging 14 employees, by physically assaulting employees, by threatening employees with arrest by immigration officials, by threatening employees with bodily harm, by causing employees to be falsely arrested, and by informing employees that they were discharged because they engaged in protected concerted activity.

The judge found that Respondent Smithfield violated Sec. 8(a)(1) by assaulting QSI employees, by threatening QSI employees with arrest by immigration authorities, by causing QSI employees to be falsely arrested, and by telling a Smithfield employee that he would not be considered for a promotion or job change to the maintenance department because of his union activities.

⁷ See, e.g., *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36 (1st Cir. 1997); *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963); *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012, 1022 (7th Cir. 1998).

⁸ 370 U.S. 9, 16 (1962).

rehire him. Thus, when QSI discharged Cruz again on November 15, the employees reasonably concluded not only that QSI had reneged on its agreement but also that further discussion with QSI was an ineffective means of protest. Cf. *Trompler*, supra, 335 NLRB at 480–481 (employee walkout to protest supervisor’s conduct was reasonable where the employer had failed to address the employees’ expressed concerns). Further, the employees had no bargaining representative to present their grievances to QSI; “they had to speak for themselves as best they could.” *Washington Aluminum*, supra, 370 U.S. at 14. In addition, there is no evidence that the walkout posed an immediate threat to the safety or health of others.⁹ See *Trompler*, supra, 335 NLRB at 480. In these circumstances, we find, in agreement with the judge, that the employees’ November 15 walkout was a reasonable means of protest.

2. In finding that Smithfield’s conduct toward QSI employees violated Section 8(a)(1), the judge implicitly rejected Smithfield’s argument that it could not be held liable for actions taken against employees of another employer. We agree with the judge for the following reasons. Section 2(3) of the Act says that “[t]he term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer” Thus, the Board “consistently has held that an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by action affecting employees who do not stand in such an immediate employer/employee relationship.” *International Shipping Assn.*, 297 NLRB 1059, 1059 (1990); see also *Fabric Services*, 190 NLRB 540, 541–542 (1971). In this case, Smithfield’s supervisors and agents, including its Special Police Force Chief Danny Priest, physically assaulted and threatened QSI employees because they engaged in protected concerted activities. Smithfield was in a position to engage in this conduct because it owned the property on which the QSI employees worked. Under the circumstances, Smithfield’s assaults and threats constituted “action[s] affecting” the QSI employees. *International Shipping Assn.*, supra. The judge therefore properly concluded that Smithfield’s conduct violated Section 8(a)(1).

3. Finally, the judge found that Smithfield violated Section 8(a)(1) when its maintenance manager, Michael Norsworthy, threatened Smithfield employee Dan English that he would not be considered for a promotion or transfer to the maintenance department because of his union activities. Although Smithfield filed exceptions to

the judge’s finding and legal conclusion, it did not articulate, either in its exceptions or briefs, any grounds for reversing the judge. Accordingly, we find, pursuant to Section 102.46(b)(2) of the Board’s Rules and Regulations, that Smithfield has effectively waived these exceptions. See *Holsum de Puerto Rico*, 344 NLRB No. 85, slip op. at 1 fn. 1 (2005). In any event, we agree with the judge that Norsworthy’s threat to English violated Section 8(a)(1). See, e.g., *Hospital Shared Services*, 330 NLRB 317, 318 (1999).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders

A. Respondent, QSI, Inc., Tar Heel, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because they engaged in protected concerted activities.

(b) Physically assaulting its employees because they engaged in protected concerted activities.

(c) Threatening its employees with arrest by Federal immigration officials because they engaged in protected concerted activities.

(d) Causing its employees to be falsely arrested because they engaged in protected concerted activities.

(e) Threatening its employees with bodily harm because they engaged in protected concerted activities.

(f) Informing its employees that they were discharged because they engaged in protected concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Munoz Guerrero, Alejandro Hernandez, Edwin Perez, Ruben Baltazar, Javier Ramirez, Juan Hernandez Valesquez, Roberto Hernandez, and Carlos Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the aforesaid employees whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writ-

⁹ The judge found that the walkout by the employees was peaceful and that the violence that occurred was initiated by the Respondents.

ing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the Smithfield Packing Company, Incorporated, Tar Heel Division, facility in Tar Heel, North Carolina, copies of the attached notice marked "Appendix A."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or if Smithfield Packaging Company, Incorporated, Tar Heel Division, has closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Smithfield Packing Company, Incorporated, Tar Heel Division, Tar Heel, North Carolina, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening its employees that they will not be considered for a promotion or job change because of their activities on behalf of the United Food and Commercial Workers International Union, CLC or any other labor organization.

(b) Assaulting employees because they engaged in protected concerted activities.

(c) Threatening employees with arrest by Federal immigration officials because they engaged in protected concerted activities.

(d) Causing employees to be falsely arrested because they engaged in protected concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Tar Heel, North Carolina facility copies of the attached notice marked "Appendix B."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent and all current and former employees employed by Respondent QSI at the Respondent's Tar Heel, North Carolina facility at any time since November 15, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 28, 2006

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Dennis P. Walsh,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹¹ See fn. 10.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because you engaged in protected concerted activities.

WE WILL NOT physically assault you because you engaged in protected concerted activities.

WE WILL NOT threaten you with arrest by Federal immigration authorities because you engaged in protected concerted activities.

WE WILL NOT cause you to be falsely arrested because you engaged in protected concerted activities.

WE WILL NOT threaten you with bodily harm because you engaged in protected concerted activities.

WE WILL NOT inform you that employees were discharged because they engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights as set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Munoz Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Javier Ramirez, Juan Hernandez Valesquez, Roberto Hernandez, and Carlos Romero full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the aforesaid employees whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the aforesaid employees, and WE WILL,

within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

QSI, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten that you will not be considered for a promotion or job change because you support the United Food and Commercial Workers International Union, CLC, or any other labor organization.

WE WILL NOT physically assault you because you engaged in protected concerted activities.

WE WILL NOT threaten you with arrest by Federal immigration authorities because you engaged in protected concerted activities.

WE WILL NOT cause you to be falsely arrested because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights as set forth above.

SMITHFIELD PACKING COMPANY, INCORPORATED,
TAR HEEL DIVISION

Jasper Brown, Jr., Esq., for the General Counsel.
William P. Barrett, Esq. and *Joshua M. Krasner, Esq.*, for the Respondent, QSI, Inc.

Gregory B. Robertson, Esq. and *Kelli D. Jackson, Esq.*, for the Respondent, Smithfield Packing Company Incorporated, Tar Heel Division.

Renee L. Bowser, Esq., for the Charging Party United Food and Commercial Workers.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Lumberton, North Carolina, on

November 1–5 and 9–12, 2004, pursuant to an amended consolidated complaint issued by the Regional Director for Region 11 of the National Labor Relations Board (the Board) on July 30, 2004. The complaint as amended at the hearing alleges that Respondents QSI, Inc. (QSI) and Smithfield Packing Company Incorporated, Tar Heel Division (Smithfield) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint is based on charges filed by the United Food and Commercial Workers International Union, AFL–CIO, CLC (the Union). The complaint is joined by the answers of QSI and Smithfield wherein they deny the commission of any violations of the Act.

Upon consideration of the testimony of the witnesses, the exhibits admitted at the hearing, and the positions of the parties as argued at the hearing and as set out in their briefs, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

A. The Businesses of the Respondents

The complaint alleges and Respondent QSI admits and I find that at all times material QSI has been a Nevada corporation with a facility located at Lumberton, North Carolina, where it is engaged in providing cleaning services for Smithfield Packing Company Incorporated, at its Tar Heel, North Carolina plant, that during the past 12 months, a representative period, Respondent QSI purchased and received at its Lumberton, North Carolina facility goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina and that Respondent QSI is now and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent Smithfield admits, and I find that at all times material Respondent Smithfield is now, and has been a Virginia corporation with a facility located at Tar Heel, North Carolina, where it is engaged in the manufacture and sale of pork products, that during the past 12 months, a representative period, Respondent Smithfield purchased and received at its Tar Heel, North Carolina facility goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina, and that at all times material Respondent Smithfield has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondents admit, and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Facts

Smithfield is a major pork processing company in the United States. It maintains its largest pork processing plant at Tar Heel, North Carolina. QSI provides cleaning services for Smithfield at the Tar Heel Plant with a complement of approximately 250 employees to perform these services. Smith-

field employs approximately 5500 to 6000 employees in the operation of its plant. The plant is located in an isolated area near Lumberton, North Carolina. Bladen County where the plant is located, has only a small Sheriff's Office. Smithfield maintains its own police force to protect its property and plant. As a result of Federal and state regulations and Smithfield's rules, only authorized persons are permitted within the plant production area and these individuals must be properly attired in personal protective and sanitary clothing to ensure the operation of the plant is safe and its products are processed and maintained in compliance with sanitary standards set by the United States Department of Agriculture. Production runs for the processing of the pork products are scheduled in two shifts from about 8 a.m. to 11 p.m. The QSI cleaning crews are scheduled on the third shift after the production runs are completed and commence their work at 11 p.m. until the cleaning is completed which may vary from 4 to 6 a.m. The cleaning crews are staffed by Spanish speaking Hispanic employees most of whom do not speak English.

The management of the cleaning crews in November, 2003, was made up of the Cleaning Crew Operation Plant Manager Manuel Plancarte, several supervisors, and three safety manager employees who had access to the plant areas being cleaned and who had the authority to cite cleaning crew employees and their supervisors for safety violations. In November 2003, there was some tension between the employees and the safety managers.

QSI contracted with Smithfield in July 2003, to provide cleaning services of its plant and equipment. Smithfield replaced Mossberg, another cleaning company that had the prior contract for cleaning services for Smithfield. A number of the management and supervisory and hourly employees of Mossberg were retained by QSI also when it assumed the responsibility for cleaning under the terms of its contract with Smithfield. QSI has a number of cleaning contracts throughout certain areas of the country. The hierarchy of QSI is as follows. QSI's headquarters is in Chattanooga, Tennessee. QSI is owned by Bob Bullard, its vice president is Tom Daniels, its corporate safety manager is Lane Parsons. Its division manager is Owen Patterson who is over several areas in the states where QSI operates. Area Managers report to the division manager. In the instant case Eduardo Guzman was the area manager over five plants in North Carolina, including the QSI operation at Smithfield's plant in Tar Heel, North Carolina. The manager of QSI's operation at the Tar Heel plant in November 2003, was Manuel Plancarte, who reported to Area Manager Guzman. Guzman testified he visited the Tar Heel plant on an average of once or twice a week. QSI also had a local office in nearby Lumberton, North Carolina. Reporting to Plant Manager Manuel Plancarte were floor managers for each of the three main areas of the plant which were the "kill" department, the "cut" department, and the "conversion" department. Within each department were several supervisors who managed a number of employees. Plancarte had several relatives under his supervision including his cousin Jorge Rodriguez, the cut floor manager and Antonio Cruz who was a supervisor in the conversion department. Juan Hernandez Velasquez who worked for Cruz in the conversion department, is the father of Antonio

¹ The following includes a composite of the credited testimony and the exhibits received at the hearing. All dates unless otherwise stated are in 2003.

Cruz and the uncle of Manuel Plancarte and Rodriguez. Plancarte and Rodriguez are cousins of Antonio Cruz and all three individuals were raised as brothers by Velasquez.

The work of the cleaning employees at the Smithfield plant can be dangerous as they are cleaning large machinery used for the processing of the pork products. There have been numerous accidents suffered by QSI employees over the years in performing cleaning services involving the loss of life and limbs, cuts, bruises, and hot water and chemical burns. The operation is closely monitored by QSI plant supervision, Smithfield plant supervision, and the QSI safety department. QSI is required to comply with all applicable United States Occupational Safety and Health Administration (OSHA) regulations. The entire operation of the plant is also subject to United States Department of Agriculture Department (USDA) rules and regulations. USDA agents daily inspect and monitor the plant for compliance with USDA rules and regulations before the plant can commence operations. In November of 2003, the plant QSI Safety Department at the Tar Heel facility was comprised of its department head Mayra Saucedo, and her assistants, Caesar Saucedo and Hugo Pasado. Mayra did not report to QSI Plant Manager Manuel Plancarte but instead reported directly to Area Safety Manager Ron Salinas and Corporate Safety Director Lane Parsons at the Chattanooga headquarters.

The work of QSI in cleaning the plant consisted of removal of animal parts, bones, blood and the like from the machinery and premises of the Smithfield operation. In order to ensure the safety of the employees cleaning the facility and equipment, they are to comply with various lockout and tagout procedures to ensure that the equipment is unable to suddenly start to run or operate while the cleaning employees are engaged in their work. The cleaning shift operates from 11 p.m. to 6 a.m. while the pork processing operation is not in operation. In November 2003, the QSI employees were paid for 7 hours commencing at the start of their shift at 11 p.m. However they were allowed to leave once their work was completed, thus motivating them to complete their work within what management considered to be the appropriate time allotted and to enable QSI's Management and Safety Department, Smithfield's Third-Shift Plant Management and Superintendent Robert Clayborne, and USDA inspectors to inspect the plant and equipment for their approval for the start up of the pork processing operation. The opportunity for employees to leave early once they had completed their work led to disagreement of the cleaning employees with strict compliance of the safety and lockdown and tagout procedures which take time to perform properly. The Safety Department was insisting on strict compliance with these safety procedures and was writing up employees and causing their termination for violations of the safety procedures. Often these employees were later rehired by QSI's management but at reduced rates of pay. Additionally some of the QSI employees believed they were being photographed while they were performing their work and were dissatisfied with this. Safety Department Manager Mayra Saucedo denied that the employees were photographed while performing their work but contended that the machinery was photographed for maintenance purposes. This testimony was corroborated by Superintendent Clayborne. The employees complained to the supervisors who complained to

upper management at the plant level. Additionally Safety Department Manager Mayra Saucedo complained to supervisors and management that the employees were not following the safety rules and urged their discipline. Some employees were disciplined but at some point, the local plant management became hostile to the Safety Department's recommendations and refused to discipline the employees for safety violations. Mayra Saucedo testified that she complained to Plant Manager Manuel Plancarte and to Area Manager Guzman but they took no action. Mayra Saucedo also had a specific problem with Supervisor Antonio Cruz² who she testified openly defied her request that he discipline an employee for a safety violation and taunted her that she would be gone soon as the plant management would get rid of her. She testified that other employees also told her she would be gone soon. In addition she testified that on several occasions Antonio Cruz came to work smelling of alcohol and on one occasion she ordered him to go to a drug testing facility for an alcohol test but that he did not show up for the scheduled test. She reported this to Plant manager Plancarte who refused to take action against Cruz. Ultimately Cruz received a 3-day suspension from Assistant Plant Manager Mike Villaneueva.

On Friday, November 7, Mayra Saucedo telephoned Patterson and informed him of the situation regarding Cruz and the failure of local management to support the Safety Department. As a result Patterson telephoned Guzman who was on his way to visit another plant and told him to discharge Cruz. Guzman proceeded back to the plant and discharged Cruz and took his badge and radio and escorted him from the plant. Guzman then proceeded to travel to another plant. An hour or so later Mayra Saucedo again called Patterson and informed him that the employees were walking out. Patterson then called Guzman again and told him to return to the plant and get the employees back to work. Guzman removed Mayra Saucedo and her assistants from the plant. Several employees testified concerning the walkout. Some employees testified that they were told there was a fire in another part of the building but were persuaded to stay once Guzman and others told them to go back to work as they were not in support of Cruz. Most others remained out and Smithfield's production for the upcoming shift on Satur-

² A number of exhibits (QSI Exhs. 14-21) purporting to document QSI's difficulties with Cruz were offered into evidence by Respondent QSI but rejected by the undersigned because they had not been turned over pursuant to the Union's subpoena, specifically Request No. 4 (QSI Exh. 34). A petition to revoke the Union's subpoena request was filed by the Respondent QSI. QSI did not produce these documents. Later during the hearing Respondent QSI attempted to move the exhibits 14-21 in evidence and faced opposition from the Union's attorney. It is well settled that the Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance *McAllister Touring & Transportation Co.*, 341 NLRB 394 (2004). See, e.g., *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986) precluding an employer from introducing into evidence documents it had failed to produce in response to the General Counsel's subpoenas. In *Perdue Farms*, 144 F.3d 830 at 834 (D.C. Cir. 1998), the Court agreed with a dissenting colleague that "a party who simply ignores a subpoena pending a ruling on a petition does so at his or her peril." To the extent that there is any question, I deny Respondent QSI's Petition to Revoke and reaffirm my ruling that QSI Exhibits 14-21 should be and they hereby are rejected.

day, November 8 was lost. On Sunday, November 9, Division Manager Owen Patterson and Corporate Safety Manager Lane Parsons, who had both traveled from Chattanooga to Lumberton arrived at the plant and met with management of the plant. The vast majority of the employees were not scheduled to work on Sunday and only a skeleton crew was required and did perform the cleaning work as the plant had been idle on Saturday.

On Monday, November 10 the employees gathered at the plant prior to the start of the 11 p.m. shift and refused to go to work at the plant unless their demands were met. They asked for a \$1-per-hour raise for all employees, the reinstatement of Antonio Cruz and Ruben Baltazar who had been terminated October 30, and other employees who had been terminated for safety violations and removal from the plant of the three individuals in the safety department. Two of the rank and file employees spoke on behalf of the employees. The Chief spokespersons were Julio Vargas and Edbin Perez. QSI agreed to the demands and a written agreement was signed by both Division Manager Owen Patterson and Area Manager Guzman. During this time many of the managers and supervisors at the plant including Plant Manager Manuel Plancarte stood by and did not urge the employees to go to work although both Patterson and Guzman were urging the employees to return to work. There was testimony that Plant Manager Manuel Plancarte told the employees to ask for a \$1-per-hour raise. There was also testimony that a meeting had been held on the morning of November 8 after the first walkout at Plant Manager Plancarte's house attended by a number of employees at which employee Juan Hernandez Velasquez had urged employees to ask for a \$1-per-hour raise and encouraged further action so that Smithfield would cancel the contract with QSI and that the former cleaning contractor Mossberg would be brought back.

After QSI had agreed to the employees' demands they returned to work. QSI complied with the demand to bring Cruz and Baltazar and other employees who had been terminated back to their jobs. The safety department employees remained out of the plant and QSI had committed to the \$1-per-hour raise to be implemented on the next payday. However Division Manager Owen Patterson determined in consultation with QSI owner Bob Bullard and Corporate Safety Director Lane Parsons that the management staff had not properly controlled the employees and that a substantial number of the management staff and some rank-and-file employees who supported the management should be terminated. The management employees to be terminated included Plant Manager Manuel Plancarte, Assistant Plant Manager Mike Villanueva, and Cut Floor Manager Jorge Rodriguez. It also included management and supervision from the cut and conversion departments and nonsupervisory employees such as Edbin Perez deemed loyal to the local plant managers rather than to QSI. It did not include the management and supervisory employees from the kill department, most of whose employees had stayed on the job on the day of the initial walkout on November 7. Safety Director Mayra Saucedo testified that Plancarte and other members of management and supervision of the cut and conversion departments had secretly met weekly in the hose room in the plant to discuss how to get QSI removed from the plant and replaced by Moss-

berg. This was denied by Manager Plancarte who testified these were general work meetings.

Following QSI's determination to discharge the aforesaid managers, supervisors, and employees it was decided that this would be accomplished on Friday, November 14th and Saturday, November 15. Arrangements were made to bring in replacement supervisors and employees from other plants and areas to perform the work of the members of management and employees to be discharged because of QSI's anticipation that a number of employees would walk out in protest of the discharges. These replacement employees were summoned or transported to the Lumberton area by QSI in the case of the supervisors and the rank-and-file employees were put up in hotels in the area. Additionally QSI notified Smithfield Superintendent Robert Clayborne of the impending planned terminations and he notified Special Police Chief Danny Priest. Arrangements were made by Special Police Force Chief Priest for Smithfield's police force to be on the plant premises with additional officers and security guards on Friday, November 14. Smithfield maintains a private armed police department as permitted by North Carolina state law to protect and monitor its premises and the surrounding property owned by Smithfield. This is a five-member police department including its chief Danny Priest and Smithfield's security manager who also serves as a deputy for Bladen County as required when he is not engaged on duty for Smithfield. Bladen County, where the Tar Heel plant is located, has only a small sheriff's department consisting of the sheriff and deputies and part-time deputies to cover the rural county of Bladen which includes a large square mile area resulting in a slow response time to calls for as long as 45 minutes or more. Smithfield perceived the need for its own police force because of the isolated area of its location and the sheer number of the approximately 5500 to 6000 people it employs at the plant and the 250 employees of QSI in the Tar Heel plant operation. Smithfield also employs several unarmed security guards to monitor materials and product being trucked in and out of the plant and to monitor the employees' entrance to the plant where employees enter and leave. Smithfield's police wear black pants and jackets labeled "police." The security guards wear gray pants and shirts. The Bladen County Sheriff's deputies wear brown uniforms. In addition to the arrangements made for replacement employees, QSI obtained permission to use the Smithfield conference room to meet with the managers, supervisors, and employees to be discharged.

On Friday, November 14, the cleaning shift began normally with the employees entering the plant and commencing work. Patterson and Guzman went to the conference room with Lane Parsons and Guzman was directed to get Manuel Plancarte, Villanueva, and Rodriguez which he did after obtaining their radios from them on the pretense that they were to be given new radios. Patterson wanted to ensure that these employees did not use their radios to alert other employees. When these employees entered the conference room, they were told they were being terminated and Patterson stepped out of the room and motioned to Smithfield police who were waiting in another area in the office where the conference room was located. The waiting police then escorted the discharged managers out of the room through the front entrance to the office area eliminating

the need to escort them through the production area of the plant. Following this, the same procedure was followed in terminating a second group. Before they were able to terminate the third group of supervisors to be terminated (which included Antonio Cruz), Cruz learned of the terminations and alerted the employees in the plant urging them to walk out and telling the employees that QSI had fired management. This began an exodus of most employees from the plant. In this regard the employees had been engaged in their work in the production area of the plant and were leaving through the main entrance and exit by a turnstile which is monitored by the gray uniformed security guards. Once outside the employees were met by Smithfield police who were to escort them to their vehicles or to require them to vacate the parking lot. Guzman, Parsons, and Patterson stood at the production area doors (the steel doors) which led into the hallway and turnstile entrance and exit area to the parking lot. Guzman and Patterson attempted to persuade the employees to remain on the job, telling them that their jobs were secure. According to some testimony of witnesses Guzman and other members of management (Parsons and Patterson) kept the plant door to the hallway and exit closed to prevent employees from leaving. A review of a video from a camera monitoring the area did not disclose any violence or frenzy but several witnesses indicated that it was a frenzied scene. At one point Patterson spotted Cruz in the production areas and chased after him until Cruz came to Smithfield's superintendent Clayborne. While chasing Cruz, Patterson was knocked down and sprayed with high volume hoses of hot water by employees Roberto Munoz Guerrero and Pablo Zacarias who testified they thought he was going to hurt their friend Antonio Cruz. They also testified that he (Patterson) was carrying a knife as he chased Cruz. Cruz testified only that it was a shiny object. I credit Patterson's testimony that he did not have a knife. Cruz was removed from the plant. Neither the discharge of Cruz or the other management employees is alleged as a violation of the Act. However there are a number of allegations of violations of the Act arising during the walk-out and from QSI's discharge of rank-and-file employees and from QSI's acts in attempting to prevent the employees from leaving the plant as well as from the arrest of employee Roberto Munoz Guerrero. Individuals in the production area are required by the U.S.D.A. to wear helmets, caps, hair nets, smocks, raincoats, steel-toed boots, and ear plugs and beard nets if they have a beard. These rules apply to everyone. U.S.D.A. inspectors are in the plant until the departments shut down after the second shift and come back in the plant prior to the beginning of production several hours later. They have the authority to shut down the plant for such violations as the failure of individuals to wear safety equipment in the production area.

The issues as framed by the complaint are:

1 Whether Respondent QSI violated Section 8(a)(1) of the Act by its discharge of employees Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Munoz Guerrero, Alejandro Hernandez, Edwin Perez, Ruben Baltazar,

Juan Hernandez Velasquez, Roberto Gonzalez Hernandez, Carlos Romero, and Javier Ramirez.

2. Whether Respondent QSI violated Section 8(a)(1) of the Act by physically assaulting employees.

3. Whether Respondent QSI violated Section 8(a)(1) of the Act by threatening employees with arrest by Federal immigration authorities.

4. Whether Respondent QSI violated Section 8(a)(1) of the Act by causing its employees to be falsely arrested.

5. Whether Respondent QSI violated Section 8(a)(1) of the Act by threatening employees with bodily harm.

6. Whether Respondent QSI violated Section 8(a)(1) of the Act by informing its employees that they were discharged for engaging in protected concerted activities.

7. Whether Respondent Smithfield violated Section 8(a)(1) of the Act by threatening its employee that he would not be considered for a promotion or job change because of his union activities.

8. Whether Respondent Smithfield violated Section 8(a)(1) of the Act by assaulting QSI employees.

9. Whether Respondent Smithfield violated Section 8(a)(1) of the Act by causing QSI employees to be falsely arrested.

10. Whether Respondent Smithfield violated Section 8(a)(1) of the Act by threatening QSI employees with arrest by Federal Immigration authorities.

Contentions of the Parties

The General Counsel contends that on the night of November 14 and specifically in the early morning hours of November 15, Respondent QSI terminated several groups of its local managers at the Tar Heel plant in Respondent Smithfield's conference room. During the course of these terminations, the employees suddenly and extemporaneously began to walk out of the plant in protest of the managers', supervisors', and employees' discharge. Respondents engaged in a combined effort to stifle the employees' engagement in lawful protected activities and thereby violated Section 8(a)(1) of the Act.

General Counsel relies on the testimony of several employee witnesses and others in support of the allegations of unlawful conduct by the Respondents. Employee Ruben Baltazar testified that as the employees were working on the night of November 14, they became aware that the supervisors were not present on the work floor and someone announced that a new supervisor was taking over. The employees gathered together and decided to leave the plant. As they walked toward the doors of the production area of the plant where the employees had been working, the doors out of the production area of the plant were blocked by Area Manager Guzman and other managers. Guzman pushed Baltazar out of the production area and told the employees that immigration was there and would take them back to their country. Employee Pablo Zacarias testified that in the early morning hours of November 15, he turned his hose on Division Manager Patterson to prevent him from going for his knife as he (Patterson) ran after Supervisor Antonio Cruz. Zacarias then went to the exit door where a group of employees were gathered. Guzman had closed the door and was preventing employees from leaving the plant. Guzman

stood with two other managers and a policeman as they blocked the door. Guzman told the employees that immigration was waiting at the door. Guzman grabbed his (Zacarias') hair and pushed him toward the wall. He was finally able to get outside the plant and encountered the Special Police who told him to leave immediately or he would be arrested.

Employee Roberto Munoz Guerrero testified that as he attempted to leave the plant in the early hours of November 15, he was met by Guzman and Chief Priest at the exit door where a large group of employees had gathered and that Guzman was preventing employees from leaving the plant and was telling employees that immigration was outside and would take them if they left. He also heard Chief Priest say the word immigration but did not recall what else he said.³

Employee Javier Ramirez testified that on the morning of November 15, he was working upstairs and went downstairs to the exit door to see what was happening as he had noticed the employees leaving the plant. He saw Guzman and several QSI managers holding the exit door to prevent employees from leaving. He also observed special police dressed in black were helping Guzman hold the exit door to prevent employees from leaving. He observed Supervisor Abel Briones arrive at the exit door and that Guzman cracked the door open to allow Briones to leave. As the door opened to allow Briones to leave, a group of employees pushed him (Ramirez) against the wall and two special police grabbed him by his belt. Guzman then pushed him against the wall. He fell to the floor and injured his leg. He then went back to the production area. After a while he left the plant and special police took his identification badge. He also testified that during the encounters at the door he heard Guzman tell employees that if they went outside, immigration would take them.

Employee Edbin Perez testified that on the night of November 14, he was working in the "hot room" in the plant. He was approached by Guzman, and a manager, the employees referred to as "Cebollo" (Patterson) and two policemen in the early morning hours of November 15. Guzman cursed him and then all of the men hit him and took him to a dark room. The police placed handcuffs on him before they took him to a room where the employees change uniforms. Guzman said that they had signed a contract with the employees and did not want (Perez) to come back to the plant. He was then pushed out of the plant and Guzman and the others said that immigration was outside and they were going to report him to immigration. He testified further that at some point in this incident that Guzman, Cebollo (Patterson), and the two policemen tried to put him in a trashcan. Ultimately he was placed in a police vehicle, driven to his vehicle, gave the police his identification badge and was allowed to leave. Perez also testified that at some point Guzman said that Perez was being put out of the plant because he asked for a "little raise."

³ Respondent QSI's unopposed motion to correct the transcript is granted. The transcript is amended to reflect that Luis Pacheco answered affirmatively when asked by Respondent QSI whether the discharged managers were threatening employees with arrest by immigration.

Employee Juan Hernandez Velasquez, who is the father of Antonio Cruz, testified that between 3 and 3:30 a.m. on November 15, he and other employees started running toward the exit doors. When he arrived in the exit area he was met by Guzman who was coming into the production area. Guzman told two policemen to "take this Mexican outside." The two policemen took each of his arms and escorted him outside the plant. They took his identification badge. He then went to one of the special police officers and asked him to help Cruz. The policemen then grabbed him by the arm and told him to leave. As he left the plant, he heard Guzman and the other managers who were near the exit doors say that immigration was outside.

Employee Roberto Gonzales Hernandez testified that as he and other employees left the plant on November 15, he heard Guzman say that immigration was outside. He saw that the police had one of his fellow employees whom he referred to as "Chesfras" and was afraid because they were saying immigration. He ran so excitedly to get away that he attempted to vault a fence on the parking lot rather than using the openings in the fence and fell and cut himself. As he ran he was chased by two policemen in blue or black uniforms.

Employee Carlos Romero testified that as he attempted to walk out on November 15 and arrived at the exit door, Guzman announced that no one could leave. However after the managers pushed Supervisor Antonio Cruz outside, he was able to get out of the plant, and saw four police officers standing where employees were exiting the plant. He walked to his vehicle and was accompanied by a police officer in a black uniform. As he opened the door to his vehicle, the police officer said, "Hurry up, immigration is coming."

General Counsel notes that in response to these allegations, Area Manager Guzman denied that he had blocked the door to prevent employees from leaving the plant and denied having said anything about immigration. He denied having pushed, kicked, or hit any employee during the walkout. He specifically denied having pushed Baltazar or having grabbed Zacarias' hair, or having pushed Ramirez, or that he grabbed and hit Edbin Perez. He did however acknowledge that he and Patterson took Perez out the back door of the plant rather than going through the normal employee exit doors. Guzman stated that he and Patterson took Perez out of the back door because it was closest to the office and locker room. However he did not testify that either he, Patterson, or Perez were ever in the office or locker room on the morning of November 15. General Counsel urges that Respondent QSI's failure to demonstrate this connection in the face of overwhelming evidence that practically all of the employees left the plant through the normal exit doors, lends itself to a finding of suspicious behavior at the least. Guzman also denied having put Perez in a trashcan and having told Perez that he was being thrown out because he asked for a raise. Guzman admitted that Perez was a strong supporter of the local management team and that he (Guzman) felt that Perez was responsible for the employee walkout and that he (Guzman) met with a large group of 140—150 employees and spoke with Julio Vargas and Edbin Perez who spoke on behalf of the employees. Guzman also denied having told security offices to remove Velasquez from the plant. QSI's Corporate Safety Manager Lane Parsons also stood at the exit doors

with Guzman and Patterson on the morning of November 15, during the walkout. Parsons denied that he engaged in any physical assault or threatened any employees with arrest by immigration authorities. He did acknowledge that the walkout and the Respondent's response created a very chaotic situation.

General Counsel further notes that Division Manager Patterson stood at the exit doors with Guzman on the night of November 15 and acknowledged that a group of 30 to 40 employees had already gathered at the exit door when he arrived. Patterson stated he stood between the employees and the door but did not push or shove any employees. He left the area to run after Cruz in the plant and acknowledged that after catching Cruz, he grabbed him by his collar, cursed him, and forcibly removed Cruz from the plant. He admitted that when he removed Cruz from the plant by physically walking him through the exit doors there was a group of employees standing there who observed this.

General Counsel notes that in contrast to the testimony of Guzman and Patterson that there was no pushing and shoving at the exit door, the testimony of several security officers reflects a more boisterous incident. Security Officer James Daniels who was stationed right outside the exit door to the production area, stated that while he could not see the events at the door, he heard a lot of hollering behind the exit doors. Daniels stated that right after hearing the loud hollering noise, the employees ran out of the doors. Security Officer Ernest Featherson confirmed that several special police were standing in the area of the turnstile where employees exit the plant on the night of November 15. Security Officer Ralph Abramo testified that he observed QSI managers escort three or four employees out of the plant that night. Security Officer Warren Spahn McLean testified that on the night of this walkout, as he worked at his security post, one of the QSI managers brought an employee out of the plant and told him "this guy needs to go." McLean then got a special police officer who escorted the employee out of the plant. McLean testified that he had been instructed on that evening to position himself at the entrance of the turnstiles and to make sure no one else was allowed back into the plant. General Counsel contends that McLean's testimony is in sharp contrast to Guzman's denial that he ever instructed any security officer to remove an employee from the plant. Chief Priest testified that he observed QSI managers escorting employees out of the plant on the night of this walkout. General Counsel notes that in response to those allegations Respondent Smithfield's special police and security officers summarily denied having physically assaulted or threatened employees during the November 15 walkout. These officers also summarily denied having threatened employees with arrest by Federal immigration authorities on the night of the walkout. The Charging Party Union in its brief argues in support of General Counsel's position as set out above.

Respondents QSI and Smithfield contend that the employee witnesses called by the General Counsel and Charging Party gave conflicting and implausible testimony which should not be credited. They contend that the testimony of QSI management employees and in particular Guzman, Patterson, and Parsons and also Chief Priest should be credited wherein they denied the blocking of the production exit doors to stop the employees

from walking out on the morning of November 15 and they denied the issuance of threats of immigration authorities waiting to arrest them and denied engaging in physical assaults and unlawful discharge of the employees.

With respect to the videotape offered into evidence by Respondent Smithfield, there is no doubt that it is incomplete and that the imagery was distorted. There are several individuals seen leaving from the production area in an apparently orderly fashion. However as Charging Party notes in her brief this portion of the videotape for the time period of 2:45 to 4 a.m. shows less than 50 employees leaving the facility. The record bears out that the vast majority of the 150 plus employees left prior to this in a frenzied manner following Respondents' efforts to prevent them from leaving the production area.

Analysis

I find that the testimony of the employees as set out above as bolstered by the testimony of Smithfield's security guards should be credited. I recognize that there are some inconsistencies in the testimony by the employees as to how many policemen and or security officers were on the scene. I find however that the crux of their testimony that they were the recipients of Guzman's attempts to block their exit from the production area and the threats issued by Guzman that they would be or were fired if they left the production area and Guzman's threats of arrest by Federal immigration authorities and the threats issued by Smithfield's special police and the physical assault on certain of the employees should be credited. I do not find the testimony of Edbin Perez to be so far fetched as to be unworthy of belief. This is particularly so as Guzman admitted that for some unexplained reason Edbin, an acknowledged supporter of the local plant management had been discharged that morning. Guzman admitted that virtually all of the other employees left by the normal employee exits but that Perez was taken out of the back of the plant. Guzman also conceded that he had intended to fire Perez, a rank-and-file employee that morning. This is inconsistent with the testimony of Patterson and Guzman that it was certain of the management employees who were to be discharged. Moreover there is no explanation as to why any of the employees were discharged except for their termination reports which labeled them as "bad employee" or "bad attitude" and noted that they were "striker(s)."

Physical Assault of Employees

I credit the testimony of Pablo Zacarias that as Guzman pushed to keep employees from leaving the plant he grabbed Zacarias' hair and pushed him toward the wall. I credit the testimony of Javier Ramirez that as he attempted to leave the plant he was pushed against the wall by a group of employees and two special police grabbed him by his belt and that Guzman then pushed him toward the wall. I credit the testimony of Edbin Perez that he was taken out of the plant by a rear exit rather than the normal exit through which all of the other employees left the plant and was hit, handcuffed, and taken to a dark room, and that the police attempted to put him in a trashcan and then placed him in a police car and took him to his vehicle where he gave the police his identification and was then allowed to leave. While I recognize the trashcan inci-

dent sounds bizarre, I noted the short physical stature of Perez and find it would be possible to put him inside of a large trash-can. I credit the testimony of Juan Velasquez that he was grabbed by the arm by a police officer and taken out of the plant after Guzman told two policemen to "take this Mexican outside." I do not find that Guzman's own Mexican heritage necessitates a finding that he would not have made this statement. I credit the testimony of Roberto Gonzales Hernandez that he was chased by two police officers and attempted to vault a fence to get away, thus injuring himself.

Although I recognize that this entire situation appears bizarre, I find that Guzman was apparently desperate to keep the employees working in the plant so as not to incur an additional loss of production and incur additional contractual penalties under its contract with Smithfield. I find the testimony of the employee witnesses as set out above was mutually corroborative and demonstrated the intentions of QSI and Smithfield to prevent the walkout by physical means if necessary. I find it is also noteworthy that in the prior Smithfield case Chief Danny Priest was found to have engaged in violence perpetrated upon employee union supporters. In the instant case before me it appears that Priest increased Smithfield's on-duty security force in anticipation of trouble, although on both the November 7 walkout and the November 10 refusal to go to work until their demands were met, there was no evidence whatsoever of any violence or misconduct on behalf of the employees. I thus find that Respondents violated Section 8(a)(1) of the Act by their engagement in physical assaults against the QSI employees.

The Threats that Employees would be Arrested by Federal Immigration Authorities

I credit and find the cumulative corroborative testimony of the employees concerning these threats support findings of violations of Section 8(a)(1) of the Act. Threats of resort to contacting Federal immigration authorities are inherently coercive as "they place in jeopardy not only the employees' job and working conditions, but also their ability to remain in their homes in the United States," *Viracon, Inc.*, 256 NLRB 245, 247 (1981); *Mid-Wilshire Health Care Center*, 342 NLRB 520, 524 (2004).

The Arrest of Roberto Munoz Guerrero

In his brief General Counsel recounts the testimony of employee Roberto Munoz Guerrero that he was finished with his work about 3 or 3:30 a.m. and saw employees leaving the plant. He also saw supervisor Antonio Cruz running toward him while being chased by another man (Patterson). He testified he saw the man take a knife out of his pocket. Guerrero then pushed Patterson to help Cruz get away from Patterson. He then turned his pressure hose on Patterson to push the knife away from him. Another employee whom he knew as "Cespita" (Pablo Zacarias) also turned his pressure hose on Patterson. Guerrero testified that five other employees came to his aid as Patterson was about to retaliate against him. Guerrero then joined the other employees as they attempted to leave the plant. At the exit door from the production area he saw Guzman, Chief Priest, and several other supervisors. He testified that Guzman told the employees that immigration was outside and would

take them away. He testified that the police were also blocking the door to prevent employees from leaving. He testified that Guzman pointed at him and told the police to arrest him. He was able to get outside of the plant and told Juan Velasquez (the father of Cruz) that Cruz had been chased by a man with a knife in the plant. He testified that he remained outside for about half an hour and then proceeded to his vehicle in the parking lot. At that point Chief Priest told him to stop. He did so and turned around to face the chief. At that point the police grabbed him, threw him on the ground and arrested him. They handcuffed him and took him to the Bladen County police station. He testified that Chief Priest also took his wallet and stepped on it. He denied that he had been asked to leave the property and had refused to leave. His case was set for trial and was dismissed by the trial judge after a second motion for a continuance by the prosecuting attorney was denied.

Patterson denied that he had a knife as he was chasing Cruz, but testified he had a radio and attachments which he may have put in his hand while he chased after Cruz. I credit his testimony in this regard. Guzman denied that he told the police to arrest Guerrero. Chief Priest testified he did not observe any pushing or shoving by the special police. He testified he moved from the turnstile area to the area outside the plant. He testified he ordered bilingual officer Hector Mariscal to tell employees in Spanish who had gathered near the canopy outside the plant to return to work or go home. After Mariscal made this announcement the employees began to disperse. Priest testified that Guerrero was with a group of employees on the grass near the canopy and that he told the group to leave the property. He testified the group would walk a short distance and then stop and turn around and that Guerrero said he needed to go back inside the plant to get his keys but that he told Guerrero that he could not go back in the plant. He testified that Guerrero again walked a short distance and stopped and said he needed his wallet. Priest testified he told the group they would have to leave the property at least ten times. He warned Guerrero he would be arrested and Officer Shaw then stepped in and handcuffed Guerrero.

General Counsel asserts that "Chief Priest and his police force at the plant have had a history of engaging in false arrest during labor disputes. In this regard, the Board recently upheld the finding of an administrative law judge that Chief Priest falsely arrested an employee during the 1997 election held at the plant" citing *Smithfield Packing Co.*, 344 NLRB No. 1, slip op. at 7 (2004).

I credit the testimony of Guerrero as set out above. I found his testimony to be consistent and logical notwithstanding his incorrect observation that Patterson was carrying a knife. I note that Guzman was at the exit door from the production area and was able to observe Guerrero's actions on behalf of Cruz who was being chased by Patterson which would explain why he singled out Guerrero and told Priest to arrest him. I found Guerrero's version of the arrest incident to be credible and logical. Conversely I do not credit Priest's assertion that Guerrero was insisting on returning to the plant to retrieve his keys and refused to leave for this reason. I find implausible Chief Priest's testimony that on the one hand he had instructed the bilingual officer to tell the employees to return to work or go

home and on the other hand that he would refuse to permit Guerrero to retrieve his keys or wallet (presumably necessary to permit him to drive his vehicle in order to leave the plant area). It appears to me that Guerrero would have been placed in an untenable situation wherein he was told to leave but was denied the means to comply (his keys and wallet). I find it more likely that Priest was complying with Guzman's earlier order to arrest Guerrero. I thus find that Respondents Smithfield and QSI violated Section 8(a)(1) of the Act by the arrest of Guerrero because of his engagement in protected concerted activities in support of the walkout of November 15.

Respondent QSI's Discharge of Employees Because they Engaged in Protected Concerted Activities

The undisputed evidence presented by the General Counsel in this case establishes a clear prima facie case that the Respondent QSI discharged its employees Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Javier Ramirez, Juan Velasquez, Roberto Hernandez, and Carlos Romero because of their participation in the walkout of employees in the morning of November 15. The evidence establishes that the employees walked out in support of their supervisors who were being terminated on the morning of November 15. Documentation of the reasons for the discharge of most of the employees—Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Javier Ramirez, Juan Velasquez, Roberto Hernandez, and Carlos Romero—is clear from Respondent QSI's records of the termination reports of the employees which list the reasons for their discharges. Respondent QSI issued employee termination reports for employees Edbin Perez, Roberto Guerrero, Pablo Zacarias, Alfredo Calderon, Julio Aquero, Alejandro Hernandez, Leticia Perez Seville, Elizabeth Perez, Clemente Paredes, and Ruben Baltazar. On each of these termination reports the date of termination is listed as 11/15/03 with the last day worked as 11/14/03. On each of these termination reports "Discharge" is checked off as the reason for termination and on almost all of the termination reports the words "Bad employee Striker" are listed under the heading entitled, "If other than lack of work, explain in detail the circumstances of the separation." On the termination report of Alfredo Calderon, the detail of the circumstances of the separation is listed as "Unsafe, Bad Attitude, Striker, etc." On the termination report of Ruben Baltazar, the detail of the circumstances of the separation is listed as "Bad Employee—unsafe." All of the termination reports were signed by Guzman on 11/20/03, and list the date of the termination as 11/15/03, and the last day worked by the employee as 11/14/03. All of the termination reports are checked off as "NO" under the question on the report, "Would the employee be considered for rehire?" QSI did not present any evidence at the hearing to substantiate any other reason for the termination of these strikers. Nor did QSI present any evidence to substantiate that Alfredo Calderon was "Unsafe . . ." Nor did QSI present any evidence to substantiate that Ruben Baltazar was—"unsafe." Baltazar had only been returned to work 2 days earlier from his

discharge of 10/30/03, following the agreement between QSI and the employees on 11/10/03. All of the above termination reports constitute clear admissions that these employees were discharged for engaging in the strike of the employees on 11/15/03. In addition employees Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Javier Ramirez, Juan Velasquez, Roberto Hernandez, and Carlos Romero testified that as they left the plant during the November 15 walkout, they were told by Guzman that they were fired. Additionally employees Carlos Romero and Roberto Gonzalez Hernandez testified that they went to the QSI office in Lumberton and were told that they had been terminated. Guzman denied that the employees had been discharged and contended that Respondent made some efforts to call back certain of the strikers but was unable to reach many of them. The evidence clearly establishes that the employees engaged in the concerted activity of the walkout in support of the local management and their fellow employees who were being terminated on the morning of November 15. Employees who walk out in protest of the discharge of a supervisor are engaged in protected concerted activity and are protected by Section 7 of the Act. Thus their discharge violates Section 8(a)(1) of the Act. *Southern Pride Catfish*, 331 NLRB 618, 620 (2000) citing *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990) as follows:

[C]oncerted activity to protest the discharge of a supervisor . . . may be 'protected' provided the identity of the supervisor is directly related to terms and conditions of employment.

Whether employee activity aimed at replacing a supervisor is directly related to terms and conditions of employment is a factual inquiry, based on the totality of the circumstances, including (1) whether the protest originated with employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; (3) whether the identity of the supervisor is directly related to terms and conditions of employment; and (4) the reasonableness of the means of protest.

I find that the evidence supports a finding that the walkout of November 15 originated with the employees in protest of the termination of their managers and supervisors including Antonio Cruz who dealt directly with the employees. I find that the management and supervisors were identified and perceived by the employees to support their position that the issuance of warnings and discipline by the safety department were unfair which was directly related to terms and conditions of employment. Moreover by virtually all accounts the walkout by the employees was peaceful and a reasonable means of protest under the Act. The violence that occurred was initiated by Respondent QSI's management and the Smithfield Special Police. The incident involving the chase of Cruz was initiated by Patterson. The assaults on the employees were initiated by Guzman and the Special Police. I find that General Counsel has established a prima facie case that the above named discriminatees were engaged in protected concerted activities when they engaged in the walkout of November 15. I find that

Respondent discharged these employees because of their engagement in the walkout which was protected concerted activity. I find Respondent has failed to establish any reasons for its discharge of these employees other than their engagement in the walkout. Respondent has thus failed to rebut the prima facie case by the preponderance of the evidence.

Respondents QSI and Smithfield contend that the evidence supports a finding that the strike occurring on November 7, the refusal to go to work on November 10 and the strike on November 15 were all fomented and led by certain of QSI's management employees who were supervisors under the Act and that all of these concerted activities were thus not protected by Section 7 of the Act as supervisory employees are not protected by Section 7 of the Act. They cite the close familial relationship of the plant manager Plancarte and Jorge Rodriguez and Cruz who were all raised as brothers by Juan Hernandez Valesquez who is the father of Antonio Cruz and the uncle of Manuel Plancarte and Jorge Rodriguez. Respondents rely on the testimony of former Safety Director Mayra Saucedo who testified she overheard plant manager Plancarte's setting up a meeting of certain of QSI's supervisors in the conversion and cut departments which she contends was motivated by the production management's desire to rid the operation of the safety department's line of authority to monitor safety practices and enforce OSHA and plant safety rules. I find there is some support for the conclusion that certain of the QSI's management at the plant were so motivated and were instrumental in urging the production employees to engage in the aforesaid concerted activities. However, I find that at the bottom of this was the employees' dissatisfaction with the safety department's overview of their work to ensure that OSHA and plant safety rules were being followed and with the safety department's imposition of discipline on the employees for safety violations. The first walkout on November 7 and the refusal to go into the plant on November 10, occurred because the employees wanted a raise and wanted the reinstatement of employees who had been discharged. With respect to the walkout of November 15, the employees were engaged in a walkout that indeed appears to have been in opposition to the firings of the supervisors. The Respondent's contend that the supervisors are not entitled to the protection afforded rank and file employees by Section 7 of the Act. However it is also well established by Board law cited supra that employees' concerted activities on behalf of supervisors who have been discharged by an employer are protected under Section 7 of the Act. Moreover at bottom of the unrest of the employees was their dissatisfaction with the monitoring of their work and discipline imposed for safety violations by the safety department. This concerted activity was clearly protected by the Act.

Respondent Smithfield's Threat to Employee Dan English

Former Smithfield employee Dan English was employed by Respondent Smithfield in the sanitation department. He was active on behalf of the Union in its organizational campaign at the Smithfield plant. In late November 2003, he attended a union rally in Fayetteville, North Carolina. In mid-December, his picture appeared in the *Fayetteville Observer* newspaper with a caption under his picture, "Smithfield worker, union

organizer." In early December he learned of a job opening in the maintenance department and talked to Supervisor Don Williamson who told him he needed someone with electrical experience. He asked Williamson to speak to his supervisor concerning his qualifications. Within 2 days of this conversation, he was in the break room with three other employees. Maintenance Manager Michael Norsworthy came in and told English that he had seen his picture and the newspaper article. English then said, "I guess the maintenance job is out." He testified that Norsworthy then spoke negatively about the Union. Norsworthy testified he was asked about a job in the case ready department by English and that he then started laughing and told English he would not touch him with a ten-foot pole if he had a target on his back.

I find that under either version, Norsworthy's comments to English were an obvious threat of negative consequences because of English's participation in the union campaign. This threat had a reasonable tendency to coerce English and interfere with his Section 7 rights to support a labor organization. This threat was inherently coercive as Norsworthy was in a position to deny English's request for the maintenance job. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). I find that Respondent Smithfield violated Section 8(a)(1) of the Act by the aforesaid threat.

CONCLUSIONS OF LAW

1. The Respondents QSI, Inc. and Smithfield Packing Company Incorporated, Tar Heel Division are employers within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent QSI, Inc. violated Section 8(a)(1) of the Act by its discharge of employees Julio Vargas Aquero, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Munoz Guerrero, Alejandro Hernandez, Edbin Perez, Rubin Baltazar, Juan Hernandez Valesquez, Roberto Gonzalez Hernandez, Carlos Romero and Javier Ramirez.

4. Respondent QSI violated Section 8(a)(1) of the Act by physically assaulting employees.

5. Respondent QSI violated Section 8(a)(1) of the Act by threatening employees with arrest by Federal immigration authorities.

6. Respondent QSI violated Section 8(a)(1) of the Act by causing employee Roberto Munoz Guerrero to be arrested.

7. Respondent QSI violated Section 8(a)(1) of the Act by threatening employees with bodily harm.

8. Respondent QSI violated Section 8(a)(1) of the Act by informing its employee Edbin Perez that he was discharged for engaging in protected concerted activities.

9. Respondent Smithfield violated Section 8(a)(1) of the Act by assaulting QSI employees.

10. Respondent Smithfield violated Section 8(a)(1) of the Act by causing QSI employee Roberto Munoz Guerrero to be falsely arrested.

11. Respondent Smithfield violated Section 8(a)(1) of the Act by threatening QSI employees with arrest by Federal immigration authorities.

12. Respondent Smithfield violated Section 8(a)(1) of the Act by threatening its employee Dan English that he would not be considered for a promotion or job change because of his union activities.

13. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents QSI, Inc. and Smithfield Packing Company have engaged in violations of the Act, it will be recommended that they cease and desist therefrom and take certain affirmative actions to effectuate the purposes and policies of the Act and post the appropriate notices, to be printed in both English and Spanish.

It is recommended that Respondent QSI offer immediate reinstatement to Julio Vargas Aquero, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Munoz Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Juan Hernandez Valesquez, Roberto Gonzalez Hernandez, Carlos Romero and Javier Ramirez to their former positions or to substantially equivalent ones if their former positions no longer exist. The above employees shall be made whole for all loss of backpay and benefits sustained by them as a result of QSI's unlawful discharge of them and its failure to reinstate them. Respondent shall also remove from their files all references to the unlawful actions taken against them.

All backpay and benefits shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) at the "short term Federal Rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

A. The Respondent QSI, Inc., Tar Heel, North Carolina, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Unlawfully discharging its employees, physically assaulting its employees, threatening its employees with arrest by Federal immigration authorities, causing its employees to be arrested, threatening its employees with bodily harm, informing its employees that they were discharged for engaging in protected concerted activities.

(b) Violating the Act in any like or related manner.

2. Take the following affirmative actions to effectuate the policies of the Act.

(a) Offer Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville,

Roberto Munoz Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Javier Ramirez, Juan Hernandez Valesquez, Roberto Hernandez, and Carlos Romero immediate and full reinstatement to their former positions without prejudice to their seniority and benefits or other rights and privileges previously enjoyed.

(b) Make the aforesaid employees whole, with interest, for any loss of earnings and benefits they may have suffered as a result of their unlawful discharges.

(c) Preserve and, within 14 days of a request, provide at the office designated by the National Labor Relations Board or its agents, one copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(d) Post at the Tar Heel plant in North Carolina copies of the notice (Appendix A),⁵ consistent with the terms of this Order immediately upon receipt thereof, and maintain them for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to QSI employees are customarily posted. Reasonable steps shall be taken by Respondent QSI to ensure that said notices are not altered, defaced, or covered by any material.

(e) Within 14 days from the date of this Order remove from its files any reference to the unlawful actions taken against the aforesaid employees and within 3 days inform them in writing of this and that these unlawful actions will not be used against them in any way.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent Smithfield Packing Company Incorporated, Tar Heel Division, Tar Heel, North Carolina, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees that they will not be considered for a promotion or job change because of their union activities.

(b) Assaulting QSI employees, threatening QSI employees with arrest by Federal immigration officials, causing QSI employees to be arrested because of their engagement in protected concerted activities.

(c) Post at its Tar Heel, North Carolina facility copies of the notice (Appendix B),⁶ consistent with the terms of this Order immediately upon receipt thereof, and maintain them for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to QSI and Smithfield employees are customarily posted. Reasonable steps shall be

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁶ Fn. 6, *supra*.

taken by Respondent to ensure that said notices are not altered, defaced, or covered by any material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as any violations are not specifically found.

Dated at Washington, D.C. April 11, 2005

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce you in the exercise of these rights. More specifically,

WE WILL NOT physically assault you for engaging in protected concerted activities.

WE WILL NOT threaten you with arrest by federal immigration authorities because you engage in protected concerted activities.

WE WILL NOT cause you to be falsely arrested because you engage in protected concerted activities.

WE WILL NOT threaten that you with bodily harm because you engage in protected concerted activities.

WE WILL NOT threaten you with discharge because you engage in protected concerted activities.

WE WILL NOT discharge our employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with you in the exercise of your rights under the National Labor Relations Act.

WE WILL offer to Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Munoz Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Javier Ramirez, Juan Hernandez Valesquez, Roberto Hernandez, and Carlos Romero full rein-

statement to their former jobs or, if those jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously engaged.

WE WILL make whole employees, Julio Vargas, Alfredo Calderon, Pablo Zacarias, Clemente Paredes, Elizabeth Perez, Leticia Perez Seville, Roberto Munoz Guerrero, Alejandro Hernandez, Edbin Perez, Ruben Baltazar, Javier Ramirez, Juan Hernandez Valesquez, Roberto Hernandez, and Carlos Romero for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision, with interest.

QSI, INC.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of these rights. More specifically,

WE WILL NOT threaten that you will not be considered for promotion if you support the Union as your collective-bargaining representative.

WE WILL NOT physically assault you for engaging in protected concerted activities.

WE WILL NOT cause you to be falsely arrested because you engage in protected concerted activities.

WE WILL NOT threaten you with arrest by federal immigration authorities because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with you in the exercise of your rights under the National Labor Relations Act.

SMITHFIELD PACKING COMPANY INCORPORATED, TAR
HEEL DIVISION